Supreme Court, U.S.
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No. 98-1268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA,
ex rel., PAUL BIDDLE,

Petitioner,

v.

BOARD OF TRUSTEES OF THE LELAND
STANFORD, JR. UNIVERSITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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The fundamental premise underlying the petition — that there is ongoing disagreement among the circuits as to the interpretation of the term "based upon" in the False Claims Act — is wrong. But for the now repudiated decision in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994), there is no disagreement among the circuits.

The petition's remaining argument challenges the district court's finding, upheld by the Court of Appeals, that petitioner was compelled by his job duties to disclose fraud and therefore his disclosure was not voluntary. The petition ignores the "clearly erroneous" standard of review and simply reargues the evidence.

STATEMENT OF THE CASE

A. Procedural Background

Petitioner Paul Biddle, while a contracting officer with the Office of Naval Research ("ONR"), commenced this *qui tam* action against Stanford pursuant to the False Claims Act on September 9, 1991. Court Record ("CR") 1. In that complaint, Biddle alleged that the Board of Trustees of the Leland Stanford Junior University ("Stanford"), violated the False Claims Act by submitting false claims for overhead or "indirect costs" under sponsored research agreements between Stanford and the federal government during the period 1981 through 1990. CR 1.

After the complaint was filed, the Department of Justice conducted an exhaustive two-year investigation in consultation with Biddle. At the conclusion of the investigation, in December 1993, the United States declined to intervene and prosecute this action. CR 42.

The subject of the appeal below was Biddle's Third Amended Complaint. Stanford filed a motion to dismiss the Third Amended Complaint on the ground that the district court lacked subject matter jurisdiction under 31 U.S.C. § 3730(e)(4). Appellant 's Excerpts of Record ("ER") 194 and 225. On August 26, 1996, the district court entered an order dismissing Biddle's complaint on the ground that it lacked subject matter jurisdiction. ER 267. The district court found, pursuant to section 3730(e)(4) of the False Claims Act, that:

> 1. The allegations of fraud in Biddle's complaint had been publicly disclosed prior to the filing of his complaint.
>
> 2. Biddle's complaint was "based upon" those public disclosures.
>
> 3. Biddle's disclosure to the government was compelled by his job duties and therefore not "voluntary" within the terms of section 3730(e)(4)(B) of the False Claims Act.

ER 267.

B. Factual Background

1. *Stanford's agreements with the government.*

Federal government agencies regularly enter into agreements with Stanford and other universities for research and other activities to be performed by those universities.

Because these agreements require universities to commit a substantial amount of their resources, the agreements are

designed to reimburse the universities for not only the direct research costs, but also related costs. CR 126, p. 2. Thus, the agreements reimburse universities for three kinds of costs: (1) direct costs (such as the researchers' salaries and supplies used for a particular research project); (2) indirect costs (a share of the "overhead," such as the costs of buildings, equipment, utilities and administrative support); and (3) staff benefits (such as health insurance and social security taxes). CR 126, p. 2.

One federal agency, the Office of Naval Research, is responsible for setting the indirect cost rates and staff benefits rate at Stanford, which are applied to all government-sponsored agreements. CR 126, p. 2. Office of Management and Budget ("OMB") Circular A-21 contains regulations governing the calculation of indirect costs and staff benefits. CR 126, pp. 2-3. OMB Circular A-21 prescribes default methods for calculating components of the indirect cost rate, but also recognizes that the default methodology may not accurately reflect the true overhead cost for a particular university. ER 226, Ex. D, pp. 1-8. Thus, OMB Circular A-21 allows universities to develop alternative methodologies pursuant to requirements set forth in OMB Circular A-21 to reflect more accurately their indirect costs.

Stanford and ONR entered into a series of agreements in the 1980s which mandated in advance the cost accounting methodologies, including the alternative methods, to be used in calculating Stanford's indirect costs, fringe benefits and direct costs under OMB Circular A-21. CR 126, p. 3. These bilateral agreements, which are specifically encouraged by OMB Circular A-21, were called Memoranda of Understanding or "MOUs." CR 126, p. 3. Most of the alleged

overcharges complained of by Biddle were specifically allowed under the MOUs. CR 126, p. 3.

2. *The government's vindication of Stanford.*

Stanford has repeatedly been vindicated by the government regarding Biddle's allegations of fraud.

After an exhaustive two-year investigation, the Department of Justice refused to intervene in Biddle's action. The Navy dropped its criminal investigation of this matter (CR 42); the Office of Chief of Naval Research ("OCNR") Inspector General did not find any fraud or improper relationship between Stanford and ONR, as Biddle had alleged (ER 226, Ex. D); and the Defense Contracting Audit Agency ("DCAA") audited Stanford's indirect rates for the years in question and did not find any fraud. CR 1, Ex. C. Finally, in October 1994, the government settled all contractual disputes with Stanford for fiscal years 1981 through 1992. ER 226, Ex. B at BS 1426-31.

At that time, the Navy publicly announced that it did "not have a claim that Stanford engaged in fraud, misrepresentation, or other wrongdoing" with respect to the matters alleged in Biddle's complaint and "determined that the memoranda of understanding for the years in question were valid and binding agreements between the Government and Stanford." *Id.*

3. *Biddle's job responsibilities.*

In October 1988, Biddle assumed responsibility as an Administrative Contracting Officer ("ACO") for the Office of Naval Research and its Resident Representative at

Stanford. ER 194 ¶ 7. When Biddle commenced his job duties, he took the position that the audit and negotiation process had not been completed for any year dating back to 1981. Thus, each year from 1981 forward was deemed an "open year" for which Biddle had the responsibility to resolve and close out. ER 261, Ex. 10.

Biddle 's job responsibilities as a contracting officer were, in part, defined by Federal Acquisition Regulation ("FAR"), which provides that the contracting officer "ensures . . . that all requirements of law" have been met (FAR 1.602-1(b)) and that:

> Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and *safeguarding the interests of the United States in its contractual relationships*. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall —
>
> . . . .
>
> (c) Request and consider the advice of specialists in audit, law, engineering, transportation, and other fields, as appropriate.

FAR 1.602-2, ER 261, Ex. 22 (emphasis supplied). Other published federal regulations also prescribe Biddle's job duties. For example, the Navy Acquisition Procedures Supplement ("NAPS") 33.209 requires that:

> When there is evidence that the inability to support any part of a claim is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the Navy Inspector General for review or the conducting of an investigation, as appropriate.

48 C.F.R. 33.209, ER 261, Ex. 13.

Biddle was aware of the above regulations and understood that his job responsibilities required him to ferret out fraud and report it to the appropriate agencies for further investigation. ER 261, Ex. 21. Biddle also understood that this responsibility existed for all "open years" (1981 through 1993) involved in this action. ER 261, Ex. 10, Appendix A. As confirmation of this understanding, on June 2, 1991, Biddle himself wrote a memorandum listing his ongoing job responsibilities, including:

> a. Coordination and assistance to DCAA in the conduct of audits of indirect costs, both proposed and actual, for *the years now open . . . These would include 1981 - 1991 actuals* and 1992, 1993, and 1994 proposed indirect cost rate submissions.
>
> b. Coordination and assistance to DCAA in the conduct of audits of staff benefits . . . *These would include 1981-1991 actuals* and 1991, 1993, and 1994 proposed staff benefit rate submissions. . . .
>
> c. Continued attention to documenting matters that are *likely to portend civil and/or criminal wrongdoing on the part of Stanford.*

. . . .

f. Additional time to review and prepare documents that *may become part of the liltigative (sic) process at some time in the future.*

. . . .

h. Identification of Stanford Accounts and transactions from readings of the Stanford Campus Report [the University-published newspaper] in prior years to *determine specific targetting [sic] areas for DCAA audits that will provided [sic] additional recoveries to the Federal Treasury.*

. . . .

m. Continued analysis of the Operations and Maintenance activities at the university as they regard *abuse, waste and fraud.*

n. Continued documentation of events during the 1980's for the Dingell Committee.

. . . .

s. Continued *review and analysis of the extent of abuse and waste* associated with relaxed property controls and oversight and transfers by ONR in prior years at Stanford.

ER 261, Ex. 10, Appendix A. (Emphasis supplied). Biddle's understanding of his duties and his actions, including requesting that DCAA perform audits, is completely

consistent with (and indeed required by) his responsibility for "safeguarding the interests of the United States" and requesting audits in support of that duty. ER 261, Exs. 18, 19, 20.

Biddle's superiors also wrote memoranda confirming Biddle's duty to disclose fraud. On September 6, September 21 and October 11, 1990, the Director of the Office of Naval Research sent Biddle memoranda assigning him to "devote [his] full attention to assist[ing] the OCNR [Inspector General] in the preparation of his report on the Stanford overhead negotiation matter." ER 261, Ex. 11. On June 11, 1991, Biddle received a memorandum from the Director instructing him that his "imperative responsibility" was to support the Naval Investigative Service in its investigation of "possible criminal conduct at Stanford University." ER 261, Ex. 8. Thus, Biddle 's duties required him to uncover and disclose fraud, Biddle understood that his duties required him to uncover and disclose fraud, and Biddle in fact sought to uncover and disclose fraud.

4. *The district court's factual determination regarding Biddle's job responsibilities.*

Based on these facts, the district court found:

> As a contracting officer, plaintiff clearly had a duty to ensure that those claims he reviewed, the indirect cost proposals he analyzed, the indirect cost rates and advance agreements [memoranda of understanding or MOUs] he negotiated were adequately supported. Moreover, it was his duty to refer suspected fraudulent claims to the appropriate investigatory authority. Therefore,

> plaintiff was clearly operating under compulsion of the directives of his job in disclosing suspected fraud in claims and negotiations he handled during his term as the ONRRR [ONR Resident Representative] Stanford.

ER 267, pp. 7-8. As the district court explained, "[t]o find otherwise would create an incentive for contracting officers to approve claims knowing they were false or fraudulent, so a later qui tam action could be brought." ER 267, p. 8, n.4. The district court weighed the evidence before it and found that Biddle was compelled to disclose to the government any evidence of alleged fraud. ER 267. That determination is fully supported by the record.

5. *The Court of Appeals' Decision.*

Contrary to petitioner's assertions, the Court of Appeals did not "prohibit *all* Government employees from acting as qui tam relators." Pet., p. 23. Rather, the Court of Appeals undertook a careful review of the entire record in order to determine whether Biddle's disclosure to the government was compelled by his job duties and therefore was not made "voluntarily." The Court of Appeals correctly concluded that "[u]pon reviewing the evidence relied upon by the district court, we believe the [district court's] findings are not clearly erroneous." Pet. Appx. p. 23a. In the proceedings before the district court, Stanford had presented extensive evidence setting forth Biddle's job duties, which required him to uncover and disclose fraud. In light of this evidence and the district court's findings, the Court of Appeals correctly held that Biddle's disclosure to the government was not voluntary.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT'S INTERPRETATION OF "BASED UPON" IS CONSISTENT WITH THE DECISION OF EVERY CIRCUIT THAT HAS ADDRESSED THE ISSUE IN RECENT YEARS.

Biddle's petition hinges on his claim that "[t]his Court should resolve the split in the circuits and clarify the meaning of the phrase[ ] 'based upon' " in the False Claims Act. Pet., p. 8. In fact, the Ninth Circuit 's interpretation is consistent with the decision of every circuit that has addressed the issue in recent years.[1]

Biddle attempts to rely upon the Fourth Circuit's holding in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994), that " 'based upon' in the FCA means 'derived from.' " Pet., p. 10. However, Biddle fails to recognize that every circuit since *Siller* has rejected the *Siller* interpretation of "based upon." The Fifth, Sixth, Tenth and District of Columbia Circuits have each held, subsequent to *Siller*, that "based upon" means "same as" or "supported by," as the Ninth Circuit holds here. *See Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 451 (5th Cir. 1995); *United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*, 123 F.3d 935, 940 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 855 (1998); *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1546 (10th Cir. 1996); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675,

1. In addition, the Ninth Circuit's decision herein is consistent with two prior Ninth Circuit decisions. *See* Pet. Appx., p. 10a.

682 (D.C. Cir.), *cert. denied*, 118 S. Ct. 172 (1997). Indeed, those decisions expressly discredit *Siller*. *See McKenzie*, 123 F.3d at 940; *MK-Ferguson*, 99 F.3d at 1546; *Findley*, 105 F.3d at 682.

In addition to these post-*Siller* decisions, numerous decisions prior to, or contemporaneous with, *Siller* (including decisions of the Second, Third and Eleventh Circuits) have reached a conclusion similar to that of the Ninth Circuit here. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2nd Cir. 1992); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1989); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991); *Cooper v. Blue Cross & Blue Shield of Florida*, 19 F.3d 562, 567 (11th Cir. 1994).

The most complete analysis was provided by the Tenth Circuit in *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993). The Tenth Circuit examined the phrase "based upon the public disclosure of allegations or transactions" and explained that as a matter of common usage, the phrase "based upon" is properly understood to mean "supported by." *Id.* Relying on the principle that "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction," the Tenth Circuit reasoned that its limited interpretation of who could sue under the statute protected the incentive for private citizens with first-hand knowledge to expose fraud. *Id.* at 552.

It makes no difference whether the *qui tam* relator is the one who caused the public disclosure. The issue is simply whether the allegations are supported by the public disclosure.

Here, Biddle filed his *qui tam* suit six months *after* the congressional hearing and over one year *after* reports in the media.

Relying on the discredited decision in *Siller*, Biddle nonetheless argues that his allegations were not "based upon" or "derived from" public disclosures because he had never seen or read any such public disclosures prior to obtaining the knowledge upon which his complaint was based. The position of the Fourth Circuit in *Siller* is contrary to that of every other circuit that has addressed the term "based upon."[2] To date, eight circuits have interpreted the term "based upon" as meaning the "same as" or "supported by" publicly disclosed information.

The *Siller* court (and Biddle) rely on one of the dictionary definitions of the term "based upon" ("to use as a basis for") without fully considering the context of the phrase in the False Claims Act. A more reasonable reading of

> the language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions . . . when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.

United States ex rel. Springfield Terminal Railway Company, 14 F.3d 645, 654 (D.C. Cir. 1994).

Biddle's proposed interpretation of "based upon" is inconsistent with the basic structure of the False Claims Act

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2. In addition to *Siller*, Biddle relies upon two district court decisions — one that is unpublished, and another that pre-dates *Siller*. Pet., p. 11. Both are completely out of step with all the circuits, except the Fourth Circuit in *Siller*.

because it would render the "original source" exception to the public disclosure bar largely superfluous and surplusage. The "original source" exception requires that the relator (1) had "direct" knowledge of the alleged fraud; (2) had "independent" knowledge of the alleged fraud; (3) voluntarily provided the information to the government; and (4) had a hand in the public disclosure of the alleged fraudulent allegations or transactions. *Springfield Terminal Ry. Co.*, 14 F.3d at 656; *Houck on Behalf of United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 504-505 (7th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990); *Wang v. FMC Corporation*, 975 F.2d 1412, 1418 (9th Cir. 1992). Biddle's proposed interpretation of "based upon" would require a court first to determine whether the plaintiff has direct and independent knowledge of the information and, if so, the complaint would not be "based upon" a public disclosure. Such an interpretation would make the "direct and independent knowledge" prong of the original source requirement unnecessary.

Thus, dismissal of Biddle's action was consistent with the purpose of the False Claims Act — to uncover and disclose fraud against the United States. Biddle's allegations are no more than "a rehash of what already had been publicly disclosed." *Id.* at 1417. Biddle's complaint was "based upon" public disclosures.

Finally, Biddle erroneously asserts that "[t]he legislative history supports a reading of the statute which broadens rather than constricts subject matter jurisdiction . . . ." Pet., p. 16. The stated purpose of the 1986 amendments to the False Claim Act is contained in the legislative history of those amendments, which proclaims:

> I. PURPOSE OF THE BILL. The purpose of S.1562, the False Claims Reform Act, is to enhance the government's ability to recover losses sustained as a result of fraud against the government.

S. Rep. No. 345, 99th Cong., 2d Sess. 2, reprinted in 1986 U.S.C.C.A.N. 5266 (1986). The Senate Report concluded that "only a coordinated effort of both the government and the citizenry will decrease this wave of defrauding public funds." Id. at 5267. Accordingly, the Senate Bill "increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the government," not for government employees to bring suits the government could and should bring itself. *Id.* (Emphasis supplied).

Because the primary concern of Congress was to enhance recoveries to the Treasury for fraud against the government, Congress sought to eliminate private actions based on information about which the government and the citizenry already had knowledge. Consequently, Congress included the public disclosure bar in the 1986 amendments to screen out actions filed after the government and the citizenry possessed sufficient information to rouse them to action.

Here, the allegations contained in Biddle's complaint had been publicized for over a year before the filing of his complaint. Prior to the filing of Biddle's complaint, the allegations had been disclosed on literally hundreds of occasions in the *San Jose Mercury News*, *The Wall Street Journal*, the *San Francisco Chronicle* and the television news magazine "20/20," just to name a few. ER 226 at BS 48, 55, 75, 225. Because of the widespread notoriety of the allegations of fraud against Stanford, both the government

and the citizenry were keenly aware of the circumstances surrounding these allegations. Biddle's *qui tam* complaint, therefore, did absolutely nothing to enhance the government's ability to recover losses, if any, that would otherwise go undiscovered. Significant government resources had already been devoted to determining if there was any fraud and recovering any alleged fraud losses[3] — and none was found. Thus, Biddle's complaint did not serve the stated purpose of the False Claims Act of recovering fraud losses that would otherwise go unrecovered.

Moreover, the paradigm whistle-blower action which Congress sought to authorize through the False Claims Act involves a private citizen with direct knowledge of undisclosed fraud against the government who brings a *qui tam* action after voluntarily disclosing to the government the allegations of fraud. *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 742 (9th Cir. 1995), *cert. denied*, 517 U.S. 1233 (1996). Congress envisioned the paradigm qui tam case as one "in which an insider at a private company brings an action against his own employer." *Id.* at 742. By allowing whistle-blowers to bring suits on behalf of the government and recover a generous bounty, the government hopes to encourage private citizen whistle-blowers to bring to light fraud which might otherwise go undetected. *Id.*

> Legislative history also suggests that Congress envisioned only this paradigm suit when enacting

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3. By the time of Biddle's complaint, Stanford had been or was being investigated by at least the OCNR Inspector General, the Naval Investigative Service (a criminal investigative agency), the Special University Team of ONR, the DCAA, the General Accounting Office, and the Subcommittee on Oversight and Investigations of the House of Representatives Committee on Energy and Commerce (which held two public hearings before the suit was filed). ER 226, Exs. C, D.

> the current version of the *qui tam* provisions. The Senate Report to the 1986 amendments to the False Claims Act, for instance, states that "[t]he Committee's overall intent in amending the qui tam section of the False Claims Act is to encourage more private enforcement suits."

Fine, 72 F.3d at 742, quoting S. Rep. No. 345, 99th Cong., 2d Sess. 23-24 (1986).

> Similarly, the House Report emphasizes that "[t]he purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the government to bring such information forward."

Id., quoting H.R. Rep. No. 660, 99th Cong., 2d Sess. 23 (1986). A case involving a "*government* employee" whose duty it is to disclose fraud to his supervisors "defies the paradigm." *Fine*, 72 F.3d at 742-43.

The intent of the False Claims Act is not served by allowing Biddle, a government employee charged with safeguarding the government's interests in the contracts at issue, to bring a *qui tam* suit to collect a personal windfall.

II.

THE COURT OF APPEALS CORRECTLY UPHELD THE DISTRICT COURT'S DETERMINATION THAT BIDDLE'S DISCLOSURE TO THE GOVERNMENT WAS NOT VOLUNTARY, AND THEREFORE BIDDLE CANNOT BE AN "ORIGINAL SOURCE" UNDER THE FALSE CLAIMS ACT.

Petitioner Biddle's remaining argument — that the Court of Appeals' decision "effectively precludes all government employees from acting as relators" (Pet., p. 17) — also mischaracterizes the Court of Appeals' decision. In fact, the Court of Appeals simply holds that Biddle's disclosure to the government was compelled by his job duties and therefore was not voluntary:

> In determining whether Biddle came forth voluntarily, the district court examined the pertinent regulations and other official documentation of Biddle's responsibilities as an ACO [Administrative Contracting Officer]. The court then concluded:
>
> > As a contracting officer, plaintiff clearly had a duty to ensure that those claims he reviewed, the indirect cost proposals he analyzed, [and] the indirect cost rates and advance agreements . . . he negotiated were adequately supported. Moreover, it was his duty to refer suspected fraudulent claims to the appropriate investigatory authority.

> Upon reviewing the evidence relied upon by the district court, we believe that the court's above findings are not clearly erroneous. Based on those findings, we hold that Biddle did not voluntarily disclose the alleged fraud regarding the contracts that were negotiated while he was employed as an ACO.

Pet. Appx., pp. 22a-23a.

Biddle ignores the "clearly erroneous" standard of review and reargues the evidence. The Court of Appeals emphasized:

> Although the question of whether Biddle was a volunteer is one of law to be reviewed *de novo*, this court must accept the district court 's findings of fact supporting its conclusion of involuntariness unless they are clearly erroneous.

Pet. Appx., pp. 17a-18a. The factual determinations of the district court underlying the Court of Appeals' holding are fully supported by the record, and certainly not clearly erroneous. In the proceedings before the district court, Stanford presented extensive evidence setting forth Biddle's job duties. That evidence included not only the Federal Acquisition Regulation, part of which was discussed by Biddle in his petition for rehearing (ER 261, Ex. 22), but also Naval Acquisition Procedures Supplement (ER 261, Ex. 13), memoranda written by Biddle (ER 261, Ex. 10, Appendix A), memoranda written by Biddle's superiors (ER 261, Exs. 8, 11) and a declaration of one of Biddle's superiors (ER 263). Biddle ignores these facts and the findings of the district court and, instead, attempts to substitute his own version of the facts.

Biddle erroneously asserts that the Court of Appeals "essentially holds that Government employees lose their ability to act voluntarily in reporting fraud once they enter public service" (Pet., p. 25), because all Government employees have duties similar to Biddle's. Again, Biddle ignores the extensive evidence setting forth Biddle's job duties, which were focused on the specific contracts at issue and went far beyond those of most government employees. Biddle did not just have a general duty to safeguard the interests of the United States; Biddle had a specific duty to safeguard those interests in the government contracts in question. *See supra*.

In light of this evidence and the district court's findings, Biddle is wrong in asserting that the Court of Appeals ruled that "federal employees can never act as *qui tam* relators." Pet., p. 23. The extensive evidence setting forth Biddle's job duties confirm that Biddle's disclosure to the government was not voluntary.[4]

Biddle also argues that his job duties "did not require that he ferret out fraud, investigate it, and report it to Congress." Pet., p. 18. Biddle's argument finds no support in section 3730(e)(4) of the False Claims Act, which requires that a Government employee asserting a *qui tam* claim "has

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4. Based upon his erroneous assumption that the Court of Appeals holds "that any duty to refer or report fraud bars such person from serving as a relator" (Pet., p. 22), Biddle argues that "[t]he Ninth Circuit's interpretation of 'voluntary' conflicts with the Congressional purpose of increasing the courts' subject matter jurisdiction." Pet., p. 20. But that is not the Court of Appeals' holding. The Court of Appeals held that Biddle's disclosure was not voluntary, in light of the district court's findings regarding Biddle's job duties compelling such disclosure.

voluntarily provided the information *to the Government*." 31 U.S.C. § 3730(e)(4)(B). Section 3730(e)(4) draws no distinction between branches of government. If, as here, disclosure to the government was compelled by the employee's job duties, he cannot qualify as an "original source" under the False Claims Act, regardless of his "persistence and tenacity." In any event, Biddle himself understood that his job duties included "[c]ontinued documentation of events during the 1980's for the Dingell Committee" of Congress. ER 261, Ex. 10, Appendix A.[5]

Finally, Biddle erroneously asserts that the Court of Appeals' decision is "in conflict with Ninth Circuit case law . . . that the 1986 amendments to the FCA did not bar Government employees from bringing *qui tam* actions." Pet., p. 23. There is no such conflict. The Court of Appeals' decision correctly states and applies its prior holding in *United States ex rel. Fine v. Chevron USA, Inc.*, 72 F.3d 740 (9th Cir. 1995). In *Fine*,

> [t]his court held that the relator did not disclose fraud voluntarily because "[h]e was a salaried government employee, compelled to disclose fraud by the very terms of his employment."

Fine, 72 F.3d at 743. Pet. Appx., p. 18a. The Court of Appeals' opinion explains:

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5. Biddle argues that he continued investigating "when faced with obstinacy on the part of his supervisors." Pet., p. 19. This was not a finding of the district court, and Biddle fails to address the Court of Appeals' determination that it would not "transform this unearthing of possible fraud into a voluntary investigation." Pet. Appx., p. 21a. By accepting his position as Administrative Contracting Officer, Biddle took on this duty and any attendant difficulties in performing it. Pet. Appx., pp. 21a-22a.

> The purposes underlying the FCA [False Claims Act] are to encourage individuals to report potential fraudulent activities being committed against the government, and to reward them for doing so. But where a government employee is paid to perform this function, the employee should not receive a windfall for merely doing his job. Biddle earned a government salary to perform various tasks, one of which was to report suspected fraud to his supervisors. Thus, he was a "salaried government employee, compelled to disclose fraud by the very terms of his employment." *Fine*, 72 F.3d at 743. . . . Why should he now receive a possible windfall for simply doing that which he was required to do and was paid to do?

Pet. Appx., pp. 21a-22a.

Contrary to Biddle's erroneous assertion (Pet., pp. 26-27), the Court of Appeals' decision does not conflict with its prior decision in *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996), *cert. denied*, 519 U.S. 865 (1996) ("*Hagood II*"). In *Hagood II*, the government employee's job "was not to expose fraud, but to draft contracts and perform other legal services for the Corps." Pet. Appx., p. 18a; quoting *Hagood II*, 81 F.3d at 1476, n.19. By its terms, *Hagood II* addresses a situation where the government employee's job is limited in scope and does not include exposing fraud. Here,

however, Biddle's disclosure was compelled by his job duties.[6] The Court of Appeals' decision correctly notes that Biddle's

> documented job responsibilities make it clear that his position entailed more than simply drafting contracts like the relator in *Hagood II*; Biddle had a duty as an ACO [Administrative Contracting Officer] to disclose fraud.

Pet. Appx., p. 21.

Thus, there is no "intra-circuit conflict," let alone any inter-circuit conflict, that would warrant certiorari.

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6. The fact that Biddle's disclosure was compelled by his job duties is critical. "[W]here a government employee is paid to perform this function, the employee should not receive a windfall for merely doing his job." Pet. Appx., p. 22a. Thus, this is readily distinguished from the situation Biddle asserts was posed in *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), where a statute required disclosure of information by a state. *See Pet.*, pp. 21-23.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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